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SABAH BANK BHD

v.

MASTER PERKASA (M) SDN BHD & ANOR

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COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
HISHAMUDIN MOHD YUNUS JCA
AZHAR MA'AH JCA
[CIVIL APPEAL NO: S-02-881-2009]

C

23 MAY 2011

BANKING: *Banks and banking business - Banking facility agreement - Failure to service facility - Variation of terms to facilitate repayment - Whether variation letter demolished terms and conditions in earlier instruments - Whether varied terms accepted unconditionally - Whether failure to adhere to terms warranted termination of banking facility - Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal*

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CONTRACT: *Termination - Right to terminate - Banking facility agreement - Termination of loan facility - Failure to service interest on monthly basis - Subsequent variation letter read in isolation of terms and conditions found in earlier instruments - Whether termination lawful - Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal*

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The appellant entered into a banking facility agreement ('BFA') with the 1st respondent wherein the appellant granted banking facilities made up of a bridging loan facility of RM18.5 million and a bank guarantee facility of RM5 million. As security, the 2nd respondent executed two personal guarantees in favour of the appellant. The purpose of the facility was to finance the 1st respondent's development project on two parcels of land ('the lands') which was purchased from Jelas Cemerlang Sdn Bhd ('JCSB'). In order to secure the purchase price for the lands, the 1st respondent requested the appellant to issue the bank guarantee for RM2 million in favour of JCSB. Since the 1st respondent had failed to pay the purchase price for the lands, JCSB had demanded payment from the appellant under the bank guarantee. In adherence to the consent order entered between the parties, the appellant released RM1.5 million to JCSB whilst the balance was to be placed in a fixed deposit account. Consequently, *vide* letter dated 21 January 1998, the appellant requested the

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1st respondent to settle the amount called upon together with interest. Although the first respondent requested for time to settle the said amount, the appellant did not accede to its request and informed the first respondent that it was recalling and terminating the entire finance facility including the bridging loan and the remaining unutilised portion of the bank guarantee. However, the 1st respondent appealed to the appellant for some time to settle the RM2 million and proposed to settle the said sum within five years. In light of this, the appellant replied to the 1st respondent, *inter alia*, that the RM2 million bank guarantee be converted into fixed loan payable by way of 60 equal monthly instalments of RM46,952.20, inclusive of interest, commencing from April 1999. Dissatisfied with the new terms, the 1st respondent requested for a further reduction of the interest, and the date of commencement for payment of instalments to begin from April 2001. The appellant agreed to the 1st respondent's request and this was communicated to the latter by its letter dated 2 July 1998 ('the said letter'), which also included the fact that in the meanwhile, interest was to be serviced monthly. The 1st respondent accepted the varied terms by signing the said letter. Notwithstanding what transpired between them and the various indulgences granted by the appellant, the 1st respondent still failed to service the interest on the RM2 million loan. Hence, the appellant filed an action in the High Court against the respondents to claim for the sum of RM2,361,399.56 under the bank guarantee which included accrued interest calculated from the date of release. The respondents on the other hand filed a counterclaim against the appellant wherein they alleged to have suffered loss resulting from the withdrawal of the bridging loan by the appellant. The issues that arose for consideration in the High Court were, *inter alia*, whether the 1st respondent was required and liable to service the monthly interest from 21 January 1998 until March 2001 at prevailing interest rate and (ii) whether the bridging loan was unlawfully terminated. The High Court found that the appellant failed to prove its case and dismissed its action. Hence this appeal by the appellant. The appellant contended that the trial judge had directed his mind solely on one single document, *ie*, the record variation in the said letter when in fact, it should have been read together with many other contemporaneous documents, *inter alia*, the BFA and various correspondences between the appellant and

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- A the 1st respondent. It was further submitted by the appellant that the trial judge was wrong to take the content of the said letter in isolation and ignoring other terms and conditions which was stated in various other documents.
- B **Held (allowing the appeal with costs)**
Per Azhar Ma'ah JCA delivering the judgment of the court:
- C (1) It was obvious that the said letter was not a stand-alone agreement. Inevitably, it had to be read together with other documents preceding it. Only then would the court be able to determine and ascertain the intentions of the parties. Hence, it was wrong to suggest that the variations contained in the said letter had the effect of demolishing all other terms and conditions found in the earlier instrument and correspondences (*Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal*; refd). (para 24)
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- E (2) The terms and conditions found in the said letter read together with the BFA and the subsequent correspondences between the parties clearly showed that the appellant had only agreed at the request of the 1st respondent to convert the RM2 million bank guarantee which had been called upon into a fixed loan payable within 60 months starting from April 2001. Whilst the appellant agreed to give the said indulgence to the 1st respondent, the appellant had impressed upon the 1st respondent to service the interest monthly in the meanwhile. As such, the 1st respondent had unconditionally accepted these varied terms and conditions by signing the said letter. (para 26)
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- G (3) It was not in dispute that under the BFA, the 1st respondent was liable as the principal debtor. This has led to the 1st respondent entering into a negotiation with the appellant for the restructuring of the loan which resulted in the 1st respondent being given five years to settle the RM2 million. Even with the new terms, the 1st respondent had failed to meet its obligation. In the circumstances, the appellant had every good reason in not wanting to proceed with the agreement and thus terminating the bridging finance. Thus, the bridging loan was not unlawfully terminated. (para 29)
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Bahasa Malaysia Translation Of Headnotes

Perayu telah memasuki satu perjanjian kemudahan perbankan ('PKP') dengan responden pertama di mana perayu telah memberi kemudahan perbankan yang terdiri daripada kemudahan kewangan bersepadu untuk RM18.5 juta dan kemudahan gerenti bank sebanyak RM5 juta. Sebagai jaminan, responden kedua telah melaksanakan dua gerenti peribadi memihak perayu. Tujuan kemudahan tersebut adalah untuk membiayai pembangunan projek responden pertama atas dua bidang tanah ('tanah tersebut') yang telah dibeli daripada Jelas Cemerlang Sdn Bhd ('JCSB'). Sebagai jaminan untuk harga belian tanah tersebut, responden pertama telah meminta perayu untuk mengeluarkan gerenti bank bagi jumlah RM2 juta memihak JCSB. Memandangkan responden pertama telah gagal untuk membayar harga belian tanah tersebut, JCSB telah menuntut bayaran daripada perayu di bawah gerenti bank itu. Berdasarkan perintah persetujuan yang dimasuki oleh pihak-pihak, perayu telah mengeluarkan RM1.5 juta kepada JCSB manakala bakinya ditempatkan dalam akaun deposit tetap. Seterusnya, melalui surat bertarikh 21 Januari 1998, perayu telah meminta responden pertama untuk menyelesaikan amaun yang dituntut bersama-sama dengan faedah. Walaupun responden pertama meminta masa untuk menyelesaikan amaun tersebut, perayu tidak bersetuju dengan permintaan itu dan telah memaklumkan responden pertama bahawa ianya akan menarik balik dan membatalkan segala kemudahan pembiayaan termasuk pinjaman kewangan bersepadu dan bahagian gerenti bank yang tidak digunakan. Walaubagaimanapun, responden pertama telah merayu kepada perayu untuk diberikan masa untuk menyelesaikan RM2 juta itu dan mencadang untuk menyelesaikan jumlah tersebut dalam masa lima tahun. Perayu telah membalas, antara lain, bahawa gerenti bank RM2 juta ditukar kepada pinjaman tetap yang dibayar secara 60 bulan ansuran sebanyak RM46,952.20, termasuk faedah, bermula dari April 1999. Tidak puas hati dengan terma-terma baru itu, responden pertama telah meminta supaya faedah dikurangkan dan tarikh permulaan bayaran ansuran bermula dari April 2001. Perayu telah bersetuju dengan permintaan responden pertama dan ini telah dimaklumkan kepada responden pertama melalui suratnya bertarikh 2 Julai 1998 ('surat tersebut'), yang juga merangkumi fakta bahawa sementara itu, faedah perlu dibayar setiap bulan. Responden pertama telah menerima terma-terma variasi itu dengan

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- A menandatangani surat tersebut. Tanpa menghiraukan apa yang berlaku di antara mereka dan beberapa kelonggaran yang diberikan oleh perayu, responden pertama masih gagal membayar faedah terhadap pinjaman RM2 juta. Oleh itu, perayu telah memfailkan tindakan di Mahkamah Tinggi terhadap responden-responden bagi
- B menuntut jumlah sebanyak RM2,361,399.56 di bawah gerenti bank termasuk faedah terakru yang dikira dari tarikh pengeluaran. Responden-responden pula telah memfailkan tuntutan balas terhadap perayu atas dakwaan bahawa mereka telah mengalami kerugian yang berbangkit daripada penarikan balik pinjaman
- C kewangan bersepadu oleh perayu. Isu-isu yang dibangkitkan untuk pertimbangan di Mahkamah Tinggi adalah, antara lain, sama ada responden pertama bertanggungjawab untuk membayar ansuran bulanan dari 21 Januari 1998 sehingga Mac 2001 pada kadar faedah semasa dan (ii) sama ada pinjaman kewangan bersepadu
- D telah ditamatkan dengan tidak sah. Mahkamah Tinggi mendapati bahawa perayu telah gagal untuk membuktikan kesnya dan menolak tindakan itu. Oleh itu rayuan ini oleh perayu. Perayu berhujah bahawa hakim perbicaraan telah mengarahkan mindanya hanya terhadap satu dokumen, iaitu, rekod variasi di dalam surat
- E tersebut sedangkan, ianya sepatutnya dibaca dengan dokumen-dokumen lain yang serentak, antara lain, PKP dan beberapa surat-menyurat di antara perayu dan responden pertama. Adalah juga dihujah dengan lanjut oleh perayu bahawa hakim perbicaraan telah dengan salah mengambilkira kandungan surat tersebut secara
- F berasingan dan mengabaikan terma-terma dan syarat-syarat lain yang tercatat dalam beberapa dokumen yang lain.

Keputusan (membenarkan rayuan dengan kos)

Oleh Azhar Ma'ah HMR menyampaikan penghakiman mahkamah:

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- (1) Adalah jelas bahawa surat tersebut bukanlah satu perjanjian yang berdiri dengan sendirinya. Ia perlu dibaca bersama-sama dengan dokumen-dokumen lain sebelumnya. Dengan cara itu, H
- mahkamah akan dapat menentukan dan memastikan niat pihak-pihak. Oleh itu, adalah salah untuk mencadangkan bahawa variasi yang terkandung dalam surat tersebut mempunyai kesan untuk memansuhkan semua terma-terma dan syarat-syarat lain yang terdapat dalam suratcara terdahulu (*Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal*; dirujuk).
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- (2) Terma-terma dan syarat-syarat yang terkandung dalam surat tersebut dibaca dengan PKP dan surat-menyurat seterusnya di antara pihak-pihak jelas menunjukkan bahawa perayu telah hanya bersetuju terhadap permintaan responden pertama untuk menggantikan RM2 juta gerenti bank yang telah disuruh bayar kepada pinjaman tetap untuk dibayar dalam 60 bulan bermula dari April 2001. Apabila perayu bersetuju dengan responden pertama untuk memberi kelonggaran tersebut, perayu telah memberi penekanan kepada responden pertama supaya ansuran bulanan dibayar sementara itu. Oleh itu, responden pertama telah menerima terma-terma dan syarat-syarat variasi itu tanpa syarat dengan menandatangani surat tersebut. A
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- (3) Adalah tidak dinafikan bahawa di bawah PKP, responden pertama bertanggungjawab sebagai penghutang utama. Ini telah menyebabkan responden pertama memasuki perundingan dengan perayu untuk penstrukturan semula pinjaman yang menyebabkan responden pertama diberi tempoh lima tahun untuk menyelesaikan RM2 juta itu. Walau pun dengan terma-terma baru, responden pertama masih gagal memenuhi obligasinya. Dalam keadaan sebegini, perayu mempunyai alasan yang baik untuk tidak meneruskan perjanjian itu dan menamatkan kemudahan kewangan. Oleh itu, pinjaman kewangan bersepadu itu tidak ditamatkan secara tidak sah. D
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- Case(s) referred to:**
Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal [2007] 3 CLJ 413 CA (*refd*) F
- [Appeal from High Court, Kota Kinabalu; Suit No: SK-22-189-1999]*
- For the appellant - Alex Decena (Lau Cheung Hoon with him); M/s Jaysuria Kah & Co* G
- For the respondent - Lim Pitt Kong; M/s PK Lim & Co*
- Reported by Kumitha Abdul Majid*

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JUDGMENT

Azhar Ma'ah JCA:

[1] The facts not in dispute were that by a Banking Facility Agreement dated 12 May 1997 entered into between the appellant and the 1st respondent, the appellant granted to the 1st respondent banking facilities made up of a bridging loan facility of I

- A RM18.5 million and a bank guarantee facility of RM5 million. As security and in consideration of the appellant granting the banking facilities, the 2nd respondent executed two personal guarantees in favour of the appellant.
- B [2] The purpose of the facility was to finance the 1st respondent's development project on two parcels of land held under Country Lease 015006194 and Country Lease 015011319 which the 1st respondent had purchased from Jelas Cemerlang Sdn Bhd (JCSB). As security of JCSB for the purchase price of the said lands, the 1st respondent requested the appellant to issue the bank guarantee for RM2 million in favour of JCSB. The bank guarantee was issued on 24 November 1997. Following the 1st respondent's failure to meet its obligation to pay the purchase price for the lands, JCSB demanded for payment from the appellant under the bank guarantee. A letter of demand dated 13 December 1997 was sent by JCSB to the appellant demanding the appellant to release the RM2 million to them. The appellant, however, did not accede to the said demand for the reason that by a letter dated 24 December 1997, the appellant was informed by the 1st respondent's solicitors that an application for injunction had been filed at Kota Kinabalu High Court on behalf of the 1st respondent to restrain the appellant from releasing the money to JCSB. Pending hearing of the application, the appellant was asked to hold on to the money.
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- F [3] Subsequently, the appellant received a letter from Messrs Lee & Thong, solicitors for JCSB dated 20 January 1998 informing the appellant that by a consent judgment, the 1st respondent had withdrawn its injunction application and a consent order was filed into court by the 1st respondent's solicitors. By the same letter, the appellant was informed that by the said consent order, parties agreed that the sum of RM1.5 million be allowed to be called and released to JCSB whilst the balance of RM500,000 would be placed into the appellant's bank under a fixed deposit account in the name of the Deputy Registrar of the High Court for a period of two years or until final order of the High Court. By that same letter, too, the solicitors on behalf of JCSB renewed their demand and requested the appellant to release the RM1.5 million to them. The appellant responded positively by releasing the said sum to JCSB. The respondent was informed of this *vide* a letter from the bank dated 21 January 1998 wherein the appellant at the same time, requested the respondent to make immediate arrangement to settle the amount called upon together with interest.
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[4] As no payment was forthcoming, the appellant by its letter dated 28 February 1998 made a second demand demanding the 1st respondent to settle the outstanding sum within seven days from the date thereof. The 1st respondent then on 11 March 1998 wrote to the appellant appealing that they be given some time and the facility be maintained and not withdraw.

[5] The appellant did not accede to the 1st respondent's above request and instead issued a letter dated 16 March 1998 informing the 1st respondent that the bank was recalling and terminating the entire finance facility including the bridging loan of RM18.5 million and the remaining unutilised portion of the bank guarantee of RM3 million.

[6] By the same letter, the appellant also demanded the 1st respondent to settle the RM2 million within 14 days or else the bank would institute proceedings for recovery. To this notice of withdrawal and demand, the 1st respondent responded whereby by its letter dated 18 March 1998, the 1st respondent appealed for the appellant's indulgence to grant the 1st respondent some time to settle the RM2 million and at the same time proposing some new terms ie, to settle the RM2 million within five years and the interest rate be reduced, with the view to lighten the 1st respondent's financial strain.

[7] By its letter to the 1st respondent dated 9 April 1998 the appellant/bank gave somewhat a favorable reply to the 1st respondent's appeal on the terms, *inter alia*, that the RM2 million bank guarantee be converted into fixed loan payable by way of 60 equal monthly installment's of RM46,952.20 (inclusive of interest) commencing April 1999 until full settlement or at an earlier date to be determined at the sole discretion of the bank and meanwhile interest is to be serviced monthly. All other terms and conditions shall remain unchanged.

[8] Not quite satisfied with the abovementioned variation and new terms granted by the bank, the 1st respondent again on 18 May 1998 wrote to the appellant/bank seeking further indulgence on the terms and conditions of payment on the grounds that they had not launched the project and its completion would be about three years thereafter. In the circumstances, the 1st respondent requested for a further reduction of the interest to

A 1%, and the date of commencement of payment of instalments to begin from April 2001, instead of April 1999 as earlier agreed by the appellant.

B [9] The appellant responded to the said request quite positively in that it agreed to reduce the interest by a further 0.5% thus making it 1.5% above BLR, and also the appellant acceded to the request that payment of installment would begin from April 2001. This was communicated to the 1st respondent by the appellant's letter dated 2 July 1998.

C [10] The 1st respondent accepted these terms by signing the said letter and at the same time expressed its appreciation to the appellant for granting their request.

D [11] Notwithstanding what had transpired between them and the various indulgence granted by the appellant to the 1st respondent, the latter still failed to service the interest on the RM2 million loan. The appellant sent out three reminders to the 1st respondent. The third reminder was sent on 2 October 1998. By that time, the 1st respondent was already nine months in arrears of their interest payment. A letter of demand was subsequently sent to the 1st and 2nd respondents. As the said demand was not heeded, the appellant/bank finally filed a writ of summons. Hence, the present action whereby the appellant/bank claimed a sum of RM2,361,399.56 under the bank guarantee which included
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F accrued interest of RM361,399.56 calculated from the date of release.

G [12] The 1st and 2nd respondents apart from filing their statement of defence also asserted their claim against the appellant/bank by way of counterclaim wherein they alleged to have suffered loss resulting from the withdrawal of the bridging loan by the appellant/bank.

The Decision Of The High Court

H [13] At the outset of the trial parties are on common ground that the issue that need to be determined by the trial judge are these:

- (1) When the RM2 million bank guarantee dated 24 November 1997 was converted into fixed loan:

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- 1.1. whether the repayment of the Fixed Loan was agreed between the plaintiff and defendant on terms, *inter alia*, that the repayment of the principal (of RM2 million) and interest was by way of sixty (60) equal monthly instalments was to commence on April 2001 until full settlement; A
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- 1.2. whether the 1st defendant is required to and liable to service the monthly interest from 21 January 1998 until March 2001 at prevailing interest rate;
- 1.3. if the answer to issue 1.2 is in the negative, whether the plaintiff's action against the 1st and 2nd defendants herein is premature; C
- 1.4. if the answer to issue 1.2 is in the affirmative, whether the 1st defendant did service the said monthly interest; D
- 1.5. if the 1st defendant did not service the said monthly interest, whether the plaintiff is entitled to terminate and recall the RM2 million terms loan;
- (2) Whether the 2nd defendant, as the guarantor is liable for the debt of the 1st defendant (if any); E
- (3) Whether the bridging loan was unlawfully terminated;
- (4) If the aforesaid bridging loan was unlawfully terminated, whether the defendants have suffered any loss or damage by virtue of the termination of the bridging loan of RM18.5 million as alleged in the counterclaim. F
- [14] With the above questions at the forefront of his mind, the learned trial judge came to his finding at the end of the trial as follows: G
- At the conclusion of the trial, I found that the plaintiff failed to prove its case against the defendant on the balance of probabilities and accordingly dismissed the action. As for the counterclaim, I allowed the claim and directed for early assessment of damages by the Deputy Registrar. H
- The starting point in considering the issues before the court has to be the document at ABD 98-99, which is a letter written by the plaintiff to the 1st defendant informing the 1st defendant of their agreement to vary the "pricing" and "repayment" of Fixed Loan in the following terms: I

A **Pricing:** 1.5% p.a. above Base Lending Rate (currently at 12.30 % p.a.) subject to fluctuation at the bank's discretion without prior notice to you. Interest is to be calculated on daily rest basis.

B **Repayment:** By way of 60 equal monthly installment's of RM46,329.40 (inclusive of interest) commencing April 2001 until full settlement or at an earlier date to be determined at the sole discretion of the bank. Installment repayments shall commence on the first day of the following month if the loan is fully released on or before 15th of the month. If the loan is fully released on or after 16th of the month, the first installment date will be the first day of the second month following the full release date.

C Meanwhile, interest is to be serviced monthly.

[15] The appellant's appeal against the above decision of the trial judge substantially is based on the premise that the judge in coming to the above decision had directed his mind solely on one single document ie, the record variation letter dated 2 July 1998 when in fact the said document should have been read together with many other contemporaneous documents comprising of the letter of offer dated 3 July 1996, the Banking Facilities Agreement (the principal contractual document) and various correspondence between the appellant and the 1st respondent. It is submitted that the 2nd variation letter is the culmination of a series of bargains and negotiations by the 1st respondent with the appellant through the said correspondence. In the light of that, it is submitted it was wrong for the trial judge to take the content of the second variation letter in isolation, ignoring other terms and conditions that are stated and found in various other documents.

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[16] It is further submitted for the appellant that the learned trial judge in coming to his decision had failed to consider the evidence of surrounding circumstances and factual background that led to the issuance of the second variation letter by the appellant.

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[17] For the respondent, it is submitted that other than the second variation letter dated 2 July 1998 which undoubtedly formed the basis of the trial judge's decision, the other documents preceding it were of no relevance and had no bearing to the appellant's claim; and thus "had no impact on the reasoning by the learned trial judge".

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[18] Having stated the circumstances and the factual matrix of the case, we now proceed to consider the issues posed before the trial judge and at the same time for our determination in this appeal. As we have earlier mentioned in approach taken by the learned trial judge in looking for the answers to the question and was by directing and focusing his mind only to the contents of the appellant's letter to the 1st respondent dated 2 July 1998 giving no attention at all to other documents preceding the said letter. With respect we seriously doubt the wisdom of this approach. We are unable to comprehend the reasons of the learned trial judge in not taking into consideration and totally ignoring the contents of the preceding documents. For clarity we produce here below 2 July 1998 letter.

SABAH BANK BERHAD (45733-D)

(Incorporated in Malaysia - Head Office - Kota Kinabalu)

H005/009.1401/98

July 2, 1998

MASTER PERKASA (M) SDN. BHD.

Letter Box 1, 8th Floor, MUI Plaza

Jalan P. Ramlee

50250 Kuala Lumpur

Attn: Mr Lim Kien Ann

Dear Sir,

Master Perkasa (M) Sdn. Bhd.

Further to our letters dated 16/3/1998 and 9/4/1998 under ref: H005/009.1401(20)/98 and H005/009.1401 and your letter dated 18/5/1998, we are pleased to inform you that our Bank is agreeable to the variations as follows:

Pricing: 1.5% p.a. above Base Lending Rate (currently at 12.30% p.a.) subject to fluctuation at the Bank's discretion without prior notice to you. Interest is to be calculated on daily rest basis.

Repayment: By way of 60 equal monthly instalments of RM46,329.40 (inclusive of interest) commencing April 2001 until full settlement or at an earlier date to be determined at the sole discretion of the Bank.

- A** Instalment repayments shall commence on the first day of the following month if the loan is fully released on or before 15th of the month. If the loan is fully released on or after 16th of the month, the first instalment's due date will be the first day of the second month following the full release date.
- B** Meanwhile, interest is to be serviced monthly.

All other terms and conditions as stipulated in our earlier letter shall remain unchanged.

- C** Notwithstanding the above, you will appreciate that the Bank reserves the right and discretion at any time to amend, vary, alter or to impose additional terms and conditions which we deem necessary without having to assign any reasons whatsoever.

- D** We trust the aforesaid terms and conditions for the above facility are acceptable to you. Kindly indicate your acceptance by signing and returning to us the duplicate copy of this letter within 14 days from the date hereof, failing which the Bank shall reserve the right to treat this offer as lapsed and cancelled. Should you have any query, please do not hesitate to contact us at any time.

- E** We are pleased to be of service to you.

Yours faithfully
for SABAH BANK BERHAD
Head Office
... sgd ...

- F** GOH CHENG BEE
Acting Chief Executive Officer

c.c. Manager, KAR

- G** We, Master Perkara (M) Sdn. Bhd., accept/do not accept the variations to this offer of FL RM2,000,000.00 based on the Terms and Conditions outlined above.

Signed by : ... sgd sgd ...
 Authorised signatories Authorised signatories

- H** : LIM GHEE KIONG CHAN KOK CHIN
 Name (s) Name(s)

I/C No. : 560203-08-5143 680427-10-5031

- I** Date :

[19] On a cursory reading of the above letter, apart from the variations in respect of interest rate and the commencement date of the instalment payments, three other pertinent points caught our attention. Firstly, the first paragraph of the said letter made reference to the bank's letters dated 16 March 1998 and 9 April 1998 and also to the 1st respondent's letter of 18 May 1998.

[20] Secondly, under the "repayment" clause, the writer of the letter had also impressed on the need for the interest to be serviced monthly by the 1st respondent.

[21] Lastly, the writer of the letter reiterated that "all other terms and conditions as stipulated in our earlier letters shall remain unchanged".

[22] In view of the above we reiterate that we are unable to fathom the mind of the learned trial judge in discarding the rest of the terms and conditions contained in the Bank Facilities Agreement and subsequent correspondence that led to the issuance of the 2 July 1998 letter when the same clearly stated that the variations therein were subject to all other terms and conditions found in those documents, and in the meanwhile, the 1st respondent was to service the interest monthly.

[23] In *Glamour Green Sdn Bhd v. Ambank Bhd & Ors And Another Appeal* [2007] 3 CLJ 413, Gopal Sri Ram JCA (as he then was), in delivering the judgment of the court, had these to say:

It is a settled guiding principle that where in a transaction more than one document or instrument is involved, court usually construes those documents together. The point was made by Raja Azlan J in *Mohamed Isa & Ors. v. Abdul Karim & Ors.* [1970] 1 LNS 82; [1970] 2 MLJ 165 in a language that cannot be rivalled. This is what Raja Azlan J (as His Royal Highness then was) said:

It is a settled rule of construction that where several documents forming part of one transaction are executed contemporaneously all the documents must be read together as if they are one.

[24] Taking cue from the above passage, and with the factual matrix of the instant case in the background, it is obvious that the 2 July 1998 letter is not a stand-alone agreement. Inevitably, it has to be read together with other documents preceding it. Only then would the court be able to determine and ascertain the

- A intentions of the parties. This is fortified by a significant clause in the 2 July 1998 letter that states that all other terms and conditions stipulated in the appellant's earlier letters shall remain unchanged. This expression is also to be found in the appellant's earlier letter of 9 April 1998 to the 1st respondent.
- B [25] In the circumstances, it is, with respect, wrong for anyone to suggest that the variations contained in the 2 July 1998 letter had the effect of demolishing all other terms and conditions found in the earlier instrument and correspondences.
- C [26] The terms and conditions found in the 2 July 1998 letter read together with the Banking Facilities Agreement and the subsequent correspondences between the parties clearly show that the appellant had only agreed at the request of the 1st respondent to convert the RM2 million bank guarantee which had been called upon into a fixed loan payable within 60 months starting from April 2001. It is to be noted that whilst the appellant agreed to give the aforementioned indulgence to the 1st respondent, the appellant in the same clause clearly impressed upon the 1st respondent to service the interest monthly in the meanwhile. The
- E 1st respondent had unconditionally accepted these varied terms and conditions by signing the said letter.
- [27] For the above reasons, the answers to the issues posed ie, issue No. 1.1, 1.2, 1.5 must necessarily be in the affirmative. With
- F regard to issue 1.4 the answer is in the negative.
- [28] As for the question whether the 2nd respondent as the guarantor is liable for the debt of the 1st respondent, we answer that in the affirmative too. The 2 July 1998 letter did not in any
- G way affect the rights and liabilities of the parties under the said personal guarantee by the guarantor who is also the director of the 1st respondent. Our view in this regard is fortified by cl. 9 which states:
- H 9. The surety's obligation hereunder shall not be discharged or released from this guarantee by any variation or alteration made after their guarantee to the terms of the contract between the bank and the customer or by any release or composition of promises to give time or any other indulgence being given to the customer or any other person or persons by the bank or by any act or
- I omission on the part of the bank notwithstanding the provisions of sections 87, 88 and 92 of the Contracts Act.

[29] On the issue as to whether the bridging loan was unlawfully terminated, in our judgment, the answer is “No”. Section 11.01(2) of the Banking Facilities Agreement provides that when notified, the 1st respondent must pay the appellant the full amount which the appellant had paid to JCSB under the bank guarantee. It is not in dispute that under the BFA the 1st respondent was liable as the principal debtor. This has led to the 1st respondent entering into a negotiation with the appellant for the restructuring of the loan which resulted in the 1st respondent now being given five years to settle the RM2 million. Even with the new terms the 1st respondent had apparently failed to meet its obligation. In the circumstances, we are of the view that the appellant had every good reason in not wanting to proceed with the agreement and thus terminating the bridging finance.

[30] The 1st respondent had clearly demonstrated its inability to carry out its side of the bargain under the BFA. We are further of the view that if at all there was any loss to be suffered by the 1st respondent resulting from this failed transaction, the appellant was not to be blamed.

[31] For the above reasons, we are of the view that the learned trial judge was wrong in dismissing the appellant’s claim and hence we allowed the appeal with costs.

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